

No. 89-1282

Supreme Court, U.S.

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In the Supreme Court of the United States

JANUARY TERM, 1990

ALLISTER BARKER,

Petitioner,

v.

CITY OF PHILADELPHIA

Respondent

and

LEONARD H. DAGIT, INC.

Respondent

RESPONDENT CITY OF PHILADELPHIA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF ALLISTER BARKER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT NO. 612 E.D. ALLOCATUR DOCKET 1989

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**COUNTER-STATEMENT OF THE QUESTION
PRESENTED FOR REVIEW**

Did the Commonwealth Court of Pennsylvania correctly hold that the failure by petitioner to file a timely appeal of the dismissal of his petition to appoint a board of viewers bars his subsequent "amended complaint" seeking tort damages and equitable relief based upon the same set of facts?

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COUNTER-STATEMENT OF THE CASE

On August 24, 1979, petitioner Allister Barker (hereinafter "Barker") filed a petition to appoint a board of viewers, alleging a taking of a portion of his property by the respondent City of Philadelphia (hereinafter "the City"). This alleged taking occurred in October or November, 1977 and involved the paving of a four foot by 100 foot section of property. On

February 25, 1980 the City filed preliminary objections which alleged, *inter alia*, that the petition failed to state a cause of action. On September 17, 1980, the lower court sustained the City's objections and dismissed the petition (A-24). The order did not grant leave to amend. The prothonotary docketed this order on October 4, 1980. On November 5, 1980, thirty-two (32) days later, Barker filed an amended complaint in trespass and equity. On the same day, Barker filed a notice of appeal from the order entered October 4, 1980.

The City filed preliminary objections to the amended complaint. Thereafter the City filed a third party complaint joining appellee Leonard H. Dagit, Inc. (hereinafter "Dagit"), the contractor who actually performed the paving. The City's objections alleged that Barker violated the rules of civil procedure in filing an amended complaint without consent or leave of court. Additionally, the City raised the bar of a pending prior action, the doctrine of *res judicata*, and informed the court that the matter was still on appeal. On April 28, 1981, the lower court denied the City's objections (A-23). The City then filed an answer and new matter raising all of these issues as affirmative defenses. On May 1, 1981, Barker filed a praecipe to withdraw and discontinue his appeal. Apparently Barker filed the praecipe with the Common Pleas Court prothonotary on April 27, 1981. However, the Superior Court prothonotary did not docket this, and it did not become effective, until May 1, 1981.

On December 17, 1985, Dagit filed a motion for summary judgment. Dagit raised, *inter alia*, the same issues raised by the City. The lower court denied this motion on September 26, 1986. Thereafter, the case went to trial. At the close of Barker's case, the City moved for a nonsuit. The court denied this motion. On March 15, 1988, the court entered a verdict against the City in the amount of \$10,000.00 and against Dagit in the amount of \$5,000.00. The City filed a motion for judgment notwithstanding the verdict, as did Barker and Dagit. The lower court denied all post trial motions and entered judgment on the verdict (A-20, 21). All

parties appealed. The Commonwealth Court reversed that portion of the judgment directed against the City (A-11).

Barker filed a petition for allowance of appeal in the Supreme Court of Pennsylvania. On October 30, 1989, the Court denied this petition (A-1). This petition followed.

SUMMARY OF ARGUMENT

Petitioner's frivolous writ of certiorari petition presents absolutely no grounds for this Honorable Court to exercise its discretion and grant review. Petitioner's argument boils down to a request that this Court act as a super-Supreme Court of Pennsylvania, deciding state law issues of proper pleading and appellate practice. The record reveals that Barker failed to file a timely appeal from the order dismissing his eminent domain petition. Therefore he waived any right to pursue any cause of action, based on the doctrine of *res judicata*.

ARGUMENT

As the Commonwealth Court of Pennsylvania correctly noted, the September 17, 1980 order, which granted the City's preliminary objections and dismissed the petition, was docketed on October 4, 1980. Pursuant to Pa. R.A.P. 902(a), an appeal had to be taken within thirty days of October 4, 1980. This period expired on Monday, November 3, 1980. However, petitioner did not file his appeal until Wednesday, November 5, 1980, thirty-two days after the order was docketed.

Utterly ignored by petitioner is the Commonwealth Court's holding. "[W]hat is also apparent and of considerable importance is that the trial court's order of September 17, 1989 [sic-1980], became the *final judgment* of the court which could not under any circumstances be 'amended' by filing an amended 'complaint'. There was simply no longer any viable 'complaint' to amend." (Slip Opin. at 6) (emphasis in original). This holding finds support in *Catanese v. Taormina*, 437 Pa. 519, 263 A.2d 372 (1970). In *Catanese*, plaintiff's complaint against one defendant was dismissed by way

of preliminary objections as in the case at bar. Instead of appealing, plaintiff filed an amended complaint against this defendant. The Pennsylvania Supreme Court sustained the dismissal of this complaint. The Court reasoned that "[w]hen the period during which an appeal could have been filed expired, the doctrine of *res judicata* became applicable to the cause of action the complaint attempted to state." *Id.*, 437 Pa. at 521, 263 A.2d at 374.

In the case at bar, petitioner failed to file a timely appeal after his petition had been dismissed. As in *Catanese*, petitioner's cause of action was barred by the doctrine of *res judicata*. Petitioner could not amend his complaint *sua sponte* and could not receive permission to amend his complaint.

Petitioner argues at length that the trial court erred in dismissing his petition without giving him leave to amend. However, as the *Catanese* Court made clear, "[t]he question whether the court below acted properly in dismissing the complaint rather than permitting amendment . . . is not before us now." *Id.*, 437 Pa. at 521, 263 A.2d at 373-4. This question could only be considered after a timely appeal. As in *Catanese*, petitioner waived his right of appellate review of the lower court's dismissal of his pleading without leave to amend by failing to file a timely appeal.

Petitioner's due process argument is a meritless for several reasons. Initially, petitioner did not seek to amend his petition to more fully set forth a cause of action in eminent domain. He sought to change his cause of action to one for trespass and equity. Therefore he needed court permission pursuant to Pa.R.Civ. P. 1033. Secondly, even if he had wanted to file an amended petition to appoint a board of viewers (which he obviously did not) he still needed court permission. *Sunbeam Coal Corp. v. Commonwealth, Game Commission*, 37 Pa. Commw., 469, 391 A.2d 29 (1978), upon which petitioner relies, make clear that "our case law states only that a lower court can 'possibly allow' an amendment of a petition for the appointment of viewers, thus rendering amendment a discretionary act . . ." *Id.*, 37 Pa Commw. at 478, 391 A.2d at 33. Neither *Sunbeam* nor any other case

statute or rule of court permits a party to file any amended pleading without leave of court. Although a lower court may abuse its discretion in not permitting an amended pleading, as in *Sunbeam*, a party must still seek court permission to file an amended pleading. The failure to obtain court permission to file an amended complaint renders it a nullity. *Catanese*.

Petitioner has not argued and cannot argue that a thirty day appeal period is a denial of his due process rights. Nor may petitioner argue that the doctrine of *res judicata* is a denial of his due process rights. Petitioner cannot cite any rule or case law that permits a party to *sua sponte* file an amended pleading after the cause of action is dismissed, or holds that a party's due process rights are violated if he fails to timely appeal and decides instead, after the expiration of the appeal period, to file an amended pleading absent court permission.

No constitutional issues are presented in this case. Petitioner merely failed to protect his rights by filing a timely appeal with the appellate court. This petition is a desperate attempt to forestall the consequences of this negligence. Therefore, this Court should reject the petition.

CONCLUSION

No constitutional rights have been violated. No special and important reasons have been presented. Therefore this Court should exercise its discretion and deny this petition.

Respectfully submitted,

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